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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 676

GIBRALTAR INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 30–31) is reported at 307 F. 2d 428. The Board's decision and order (R. 1–10)[1] are reported at 133 N.L.R.B. 1527.

JURISDICTION

The judgment of the court below (Pet. 30–31) was entered on August 23, 1962. On October 26, 1962, an order was entered by Chief Justice Warren, extending the time for filing a petition for a writ of certiorari to

[1] "R." references are to the transcript of record printed in the court below. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

December 21, 1962 (Pet. 2). The petition was filed on December 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 146, 29 U.S.C. 160(e)).

QUESTION PRESENTED

Whether the Board properly found that Gibraltar Industries was a joint employer with International Trailer Company of certain employees, and was therefore jointly liable for remedying the unfair labor practices against those employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 32–33 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

International Trailer Company, Inc. (hereafter International), which was wholly owned by its president, James Fyle, was engaged in the manufacture of mobile homes and commercial trailers. In 1958, Gibraltar Industries, Inc. (hereafter Gibraltar), was established as a mobile home wholesaler by Charles Painter and E. B. Jeffress; James Fyle became Gibraltar's secretary (R. 2, 16; 104; Pet. 24). Subsequently, Painter bought out Jeffress' interest, becoming the sole owner of Gibraltar except for two per cent of the stock owned by Fyle (R. 2; 115).

Painter, Gibraltar and International executed a contract in December 1958, establishing International

as the exclusive source of mobile homes for Gibraltar's sales, and requiring International to manufacture only for Gibraltar. Painter agreed personally to provide International with working capital and to indemnify its suppliers. The agreement was subject to termination at Gibraltar's option if International failed to deliver 100 mobile homes per month (R. 2; 68–71).

International soon found itself short of working capital (R. 2; 116) and failed to meet its production quota; Painter found fault, too, with the quality of International's products (R. 2, 17–18; 115–116, 147). In early 1959, Gibraltar established offices on International's premises, Painter moved into offices adjoining Fyle's, and a "Gibraltar" sign was placed over Painter's door (R. 2; 162–163). Both Painter and Gibraltar began advancing large sums of money to International (R. 2; 113), and Painter began assuming an increasing share of authority over the production aspects of the venture. Painter frequently ordered changes on the International production line (R. 3; 115–116, 142–143), and appeared at meetings of International's supervisors (R. 91–92, 96–97, 100, 165–168). Also, Painter exercised the privilege accorded by the 1958 agreement to inspect inventory and production records of International and to refuse to guarantee payment to suppliers when he deemed inventory in excess of production needs (R. 3).

In June of 1959, Fyle endorsed all of his shares of International stock—the entire outstanding issue—to Painter (R. 126), who was also given a chattel mortgage on International's equipment (R. 2, 18; 72–74, 145–146). After October 1959, International's

bank refused to permit Fyle to continue drawing checks on International's accounts unless Painter acted as guarantor, which he did (R. 2, 17; 127). When International fell into rental arrears by some $8,000, Painter assumed liability for the back rent and advanced funds each month thereafter for the current rent; in return, Gibraltar was given the right to terminate the lease, upon notice, of all property occupied by Gibraltar and International (R. 75–80, 119, 122–123). Further, by 1960, Painter was advancing funds to pay for all of International's insurance (including workmen's compensation) (R. 171–172); for International's weekly payroll (R. 2; 104–105); and for International's purchases of supplies (R. 105–107). In exchange for all these advances, Painter and Gibraltar took credit against future delivery of mobile homes to Gibraltar (R. 105–106).

In early summer of 1960, at Painter's behest, the "International" sign was removed from the door to International's office, and thereafter the name appearing on the machinery, premises, equipment, and finished mobile homes read "Gibraltar" (R. 3; 84–85, 88–90, 102–103, 117–118, 162–163). When Fyle placed a help wanted advertisement in the local newspaper in May 1960, Painter ordered the copy changed so that Gibraltar's name was substituted for International's (R. 67, 133).

Painter also controlled International's relations with its employees. Day-to-day supervision of the employees was the task of the plant superintendent. In June 1959, Painter replaced the superintendent, chose his successor, and established a supervisory sys-

tem from which Fyle was excluded (R. 82, 130–133). In addition, Painter vetoed a raise which Fyle had intended for himself (R. 127–129); discontinued the grant of paid holidays to production employees, over Fyle's objection (R. 3; 134, 159–160); exercised the authority to shut down and reopen the plant (R. 3; 156–157); ordered the discharge of dissatisfied International employees (R. 98–99); convinced an International foreman to stay on the job by offering a pay raise (R. 169–170); denied Fyle's request to rehire his own former secretary (R. 3; 157–158); and transferred all authority for International's purchasing from Fyle to one Segart, Painter's personal airplane pilot (R. 164). Later, when International's employees sought salary increases, they looked to Painter (R. 3; 150–151, 155, 161, 169–170), and when they signed union authorization cards, they named Gibraltar as their employer (R. 27, 28; 85–86, 91).

In August of 1960, District 12 of the International Association of Machinists started to organize the International employees. When Fyle and Painter learned that union cards were being distributed, they engaged in a campaign of anti-union conduct—interrogating employees, threatening them with reprisal if they joined the union, discharging those suspected of leadership in the Union's organizing effort, and denying the Union's request for recognition when it had achieved majority support (R. 4–5; 87–88, 92–95, 97–98, 100–102, 120–121, 135–136, 139–141, 164). Painter himself played an active role in this conduct (R. 4). He personally interrogated and threatened employees (R. 94–95, 98, 100–102), and paid for the

installation of electronic eavesdropping equipment which, under his supervision, was installed to detect the union leaders among International's employees (R. 5; 141–142).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found, upon the basis of the economic relationship between Gibraltar and International, the control Gibraltar exercised over the employees of International, and the active participation of Painter in the anti-union conduct described above, that Gibraltar and International were joint employers of the International employees. The Board further found that the anti-union conduct which had been engaged in violated Sections 8(a) (1), (3) and (5) of the Act, and that both International and Gibraltar were responsible for those violations.

The Board's order required Gibraltar and International to cease and desist from the unlawful conduct found, to offer the discharged employees reinstatement, "jointly and severally" to make them whole for pay losses, and to bargain collectively with the Union (R. 6–8).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals concluded that there was substantial evidence to support the Board's finding that Gibraltar and International were joint employers, and the Board's unfair labor practice findings. It accordingly enforced the Board's order in full. (Pet. 23–29.)

ARGUMENT

1. The Board and the court below, in concluding that Gibraltar was a joint employer with International of the employees involved, applied a test which petitioner acknowledges (Pet. 18) is in accord with settled principles, *i.e.*, that two entities may be regarded as a single employer where there is integration of operations, common control over labor relations and joint participation in the unfair labor practices.[2] Petitioner contends, however, that this test is erroneous, for it is contrary to Congress' intention in amending the Act in 1947 that common law principles of agency shall govern the decision of this question (Pet. 8–20). The issue raised by petitioner does not warrant review by this Court.

The contention is urged for the first time before this Court; petitioner's position before the Trial Examiner, the Board, and the court below was simply that the Board's findings on the "joint employer" question were not supported by substantial evidence (see p. 9, *infra*). As in *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350, "No ex-

[2] See, *e.g.*, *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226, 227; *National Labor Relations Board* v. *Jones Sausage Co.*, 257 F. 2d 878, 879–880 (C.A. 4); *National Labor Relations Board* v. *Parran*, 237 F. 2d 373, 375 (C.A. 4); *A. M. Andrews Co. of Oregon*, v. *National Labor Relations Board*, 236 F. 2d 44, 45 (C.A. 9); *National Labor Relations Board* v. *McCatron*, 216 F. 2d 212, 213–214 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relations Board* v. *Concrete Haulers, Inc.*, 212 F. 2d 477, 479 (C.A. 5); *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 238 (C.A. 8), certiorari denied, 334 U.S. 845; *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 855 (C.A. 8); *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 71 (C.A. 3).

traordinary circumstances are present such as would justify permitting the issue to be raised here for the first time." Moreover, as we now show, there is plainly no substance to petitioner's position.

As petitioner points out (Pet. 12–14), Congress in 1947 amended the definitions of "employer" and "employee" in Sections 2(2) and (3) of the Act. The former definition included "any person acting in the interest of an employer," and this was replaced by the phrase "any person acting as an agent of an employer." The latter definition contained no specific exclusion for independent contractors or supervisors, and one was added. In making these changes, Congress indicated dissatisfaction with prior decisions which had held the employer responsible for unauthorized acts of supervisors, and had brought within the coverage of the statute individuals who would be regarded as independent contractors under common law tests; Congress intended that henceforth these questions would be decided under common law principles.[3]

The problem here is an entirely different one. It does not involve holding the employer responsible for the acts of supervisory employees or the question of whether certain individuals are employees or independent contractors; rather, the question is whether the economic relation between two enterprises is so intertwined that they may be treated as a single or

[3] See the legislative history cited at Pet. 12–14. See also, H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 31–33, 1 Leg. Hist. of the Labor-Management Relations Act, 1947 (G.P.O., 1948), 535–537.

joint employer of the employees involved for purposes of the Act. There is nothing in either the language of the amendments to Sections 2(2) or (3) of the Act or in their legislative history to indicate that Congress was addressing itself to that problem or intended to apply common law principles to it. This is confirmed by the solid line of decisions since 1947 (see note 2, p. 7, *supra*) which have decided the "joint employer" question according to the same principles which were applied by the Board and the court below in this case. See also *National Labor Relations Board* v. *Deena Artware*, 361 U.S. 398.

2. Petitioner further contends (Pet. 20–22) that, even if the proper criteria were applied, the Board's findings are not supported by substantial evidence. The resolution of that issue adversely to petitioner likewise presents no question warranting further review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the facts detailed in the Statement show that the Board's findings are amply supported by substantial evidence on the whole record. Nor is a different conclusion required because the trial examiner found James Fyle an unreliable witness (Pet. 21). The Board's findings, as the court below noted (Pet. 28, n. 2), do not depend to any substantial extent on Fyle's testimony. The facts upon which the Board based its conclusions were credibly and consistently related by various employee witnesses, by a Union representative, and by International's plant superintendent. Indeed, Painter himself admitted most of the evidentiary facts (Pet. 24).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

GARY GREEN,
Attorney,
National Labor Relations Board.

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